IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 245

MAURICE STECKLER, Administrator c. t. a. of the Estate of David Steckler, Deceased, &c.,

Petitioner,

against

THE PENNROAD CORPORATION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

EMIL WEITZNER,
JAMES HOWARD MOLLOY,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court entered on May 11, 1943 (R. 77), affirming a judgment of the United States District Court for the Eastern District of Pennsylvania, entered on April 6, 1942 (R. 13), granting defendants' motion for judgment on the pleadings and dismissing the complaint in the above entitled action.

Statement of Matters Involved

This is a derivative action. Plaintiff is the administrator c. t. a. of the estate of a deceased stockholder of Pennroad Corporation (herein referred to as "Pennroad"), a Dela-

ware corporation. The defendants, excepting Pennroad, were or are directors of Pennroad or representatives of the estates of deceased directors.

The Pleadings

The amended complaint alleges that Pennroad, in violation of Section 54(2) of the Public Service Law of New York (Chapter 48 of the Consolidated Laws, L. 1910, c. 480, as amended), purchased prior to 1931, and has since held, approximately 19½% of the voting capital stock of Boston and Maine Railroad (herein referred to as "Boston and Maine"), a railroad corporation "organized and/or existing" under the laws of New York and also under the laws of Massachusetts, Maine and New Hampshire; that said purchase, in so far as it exceeded 10% of the said stock of Boston and Maine, was void and of no effect; that no valid title to said shares was ever acquired by Pennroad; that the defendant directors wrongfully caused Pennroad to purchase said shares in violation of said statute; and that as a result thereof Pennroad suffered great loss and damage (R. 21-33).

The amended complaint further alleges that the purchase and holding of the said shares were also in violation of Section 5 of Chapter 156, and Section 2 of Chapter 181, of the General Laws of Massachusetts (Tercentenary Ed., 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597; *id.*, p. 2449, Mass. Acts, 1894, c. 381, as amended), and in violation of the express provisions of the certificate of incorporation of Pennroad (R. 34-37).

The joint and several answer of all of the defendants admits that Pennroad purchased, and has continued to hold, approximately 19½% of the said stock of Boston and Maine, but denies that said purchase and holding were in violation of the statutes referred to in the amended complaint and the provisions of the certificate of incorporation of Pennroad (R. 39-60).

The Statutes Involved

The Applicable New York Statute

Section 54(2) of the New York Public Service Law (Chap. 48 of the Consolidated Laws, L. 1910, c. 480, as amended), in so far as applicable here, provides:

> "* * * no stock corporation of any description, domestic or foreign, * * * shall purchase or acquire, take, or hold, more than ten per centum of the voting capital stock issued by any railroad corporation * * * organized or existing under or by virtue of the laws of this state * * *. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation, in violation of any provision of this chapter, shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such railroad corporation * * * or shall be recognized as effective for any purpose."

The Applicable Massachusetts Statutes

Section 5 of Chapter 156 of the General Laws of Massachusetts (Tercentenary Ed., 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597), in so far as applicable here, provides:

> "No corporation, unless authorized by a special act still in force, shall purchase, acquire, take or hold, directly or indirectly, more than ten per cent of the total capital stock of any domestic corporation authorized to carry on within the commonwealth the business of a railroad, * * *."

Section 2 of Chapter 181 of the General Laws of Massachusetts (Tercentenary Ed., 1943, Vol. II, p. 2449, Mass. Acts, 1894, c. 381, as amended), in so far as applicable here, provides:

> "A foreign corporation * * * shall not engage or continue in any kind of business in this commonwealth the transaction of which by domestic corporations is not permitted by the laws of this commonwealth."

Questions Presented

1. Do the provisions of Section 54(2) of the Public Service Law of New York, regulating railroad corporations "organized or existing under or by virtue of the laws of this state", apply to a consolidated railroad corporation holding a charter from other states as well as from the state of New York?

2. Does a railroad corporation organized under the Railroad Law of New York, Article 4, Sections 140-143, and also under the laws of other states, subject itself to the restrictions and duties pertaining to strictly New York railroad corporations?

3. If Section 54(2) of the Public Service Law of New York is applicable to a consolidated railroad corporation, is it entitled to recognition in litigation in another forum to which such consolidated corporation is a stranger?

4. Are the directors of a corporation liable to such corporation in a derivative action at common law for losses resulting from the purchase of shares of stock in violation of Section 54(2) of the Public Service Law of New York, or does the statute permit only penal or injunctive relief in a proceeding brought by the public authorities of the state of New York?

5. If the directors of a corporation are liable at common law to the corporation for the losses resulting from the purchase of shares of stock of a consolidated corporation in violation of Section 54(2) of the Public Service Law of New York, may a derivative action against such directors be maintained in a federal court, having jurisdiction based upon diversity of citizenship, in a state to which the consolidated corporation in question is a stranger, or is such action maintainable only in the state of New York?

6. Is Section 54(2) of the Public Service Law of New York in violation of the Commerce Clause, Article 1, Section 8, of the Constitution of the United States, and in conflict with the amendment of June 16, 1933 to the Transportation Act of 1920, 49 U. S. C. A., Section 5 (Act of June 16, 1933, c. 91, Section 202, Title II, 48 Stat. 217, 219, as amended)?

7. Was the purchase of 19½% of the stock of Boston and Maine in violation of the provisions of the certificate of incorporation of Pennroad which prohibited said corporation from exercising in any state any power which a domestic corporation of said state could not exercise?

Similar questions are presented with respect to Section 5 of Chapter 156, and Section 2 of Chapter 181, of the General Laws of Massachusetts, above referred to.

Reasons for Granting the Writ

1. The decision of the court below that a consolidated railroad corporation is not "organized or existing" under the laws of the state of New York, within the meaning of Section 54(2) of the Public Service Law of the state of New York, is a decision of an important question of local and general law probably in conflict with applicable local decisions and with the practice of the New York Public Service Commission (see Brief, Point I, pp. 10-13).

2. The decision of the court below, in failing to hold that the consolidation of a New York corporation with corporations of other states under the New York Railroad Law, Section 141, resulted in subjecting the new consolidated railroad corporation to the restrictions and duties of a strictly domestic railroad corporation, including the duty to comply with Section 54(2) of the New York Public Service Law, is a decision of an im-

portant question of local and general law probably in conflict with applicable local decisions and with the applicable decisions of this Court (see Brief, Point I, pp. 13-14).

3. The decision of the court below that the applicable New York and Massachusetts statutes regulating control of consolidated railroad corporations by stock ownership constitute local regulations not entitled to recognition by a federal court in a state in which said consolidated corporation is not chartered is a decision of an important question of local and general law probably in conflict with applicable local decisions (see Brief, Point I, pp. 11, 16-18).

4. The decision of the court below that this derivative action is not maintainable in a federal court in Pennsylvania is a decision of an important jurisdictional and conflict of laws question probably in conflict with applicable local and federal court decisions, and with the provisions of the Judicial Code, Section 51, 28 U. S. C. A., Sec 12, as amended (see Brief, Point III, pp. 19-21).

5. The decision of the court below that a derivative action may not be maintained for losses sustained as a result of the violation of the applicable New York and Massachusetts statutes, but that only the public authorities of New York and Massachusetts may enforce the provisions of said statutes, is a decision of an important question of local and general law probably in conflict with applicable local decisions (see Brief, Point II, pp. 18-19).

6. This case presents for the first time the question whether the amendment of June 16, 1933 to the Transportation Act of 1920, 49 U. S. C. A., Section 5 (Act of June 16, 1933, c. 91, Sec. 202, Title II, 48 Stat. 217, 219,

as amended), supersedes Section 54(2) of the Public Service Law of New York, Section 5 of Chapter 156, of the General Laws of Massachusetts, and similar statutes of other states regulating the control of railroads engaged in interstate commerce (see Brief, Point V, pp. 25-26).

Importance of the Questions Presented

The questions herein raised with respect to the regulation by states of consolidated corporations are important questions of first impression, not the subject of judicial decisions by this Court. Whether or not consolidated corporations are subject to the prohibitions of statutes enacted by one of several charter states, which by their provisions are applicable to corporations "organized or existing" under the laws of said state, will tend to determine the extent to which consolidated corporations are regulated by state legislation. If, as the courts below have held, consolidated corporations are not subject to said statutes, then such corporations are effectively removed from state regulation, for there is no body of state laws relating to the regulation of consolidated corporations as such. It is to be noted that the Circuit Court of Appeals, in its opinion, has expressed doubt as to the answer to this important question (R. 71).

This case raises equally important jurisdictional questions. The court below has held that even if the present action could be maintained in New York, a federal court in Pennsylvania, having jurisdiction based on diversity of citizenship, could not hold the directors of a corporation liable for losses sustained by said corporation by reason of the violation of Section 54(2) of the New York Public Service Law. As a practical matter, derivative actions against directors of corporations are brought where the directors reside and can be served. Such defend-

ant corporations may be served in any district where such corporations reside "or may be found" (Section 51 of the Judicial Code, as amended by Act of April 16, 1936, c. 230, 49 Stat. 1212, 28 U. S. C. A. 112). In the instant case the individual defendants could be served only in Pennsylvania; Pennroad only in Delaware or Pennsylvania. The defendants could not be served in New York. If the federal courts will not entertain derivative actions against directors for losses resulting from acts which are made illegal by virtue of the laws of states other than that in which the directors reside, and in which the action is brought, directors may commit illegal acts free from any liability for resulting losses to their corporation so long as said acts do not violate the laws of the state in which they reside.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

Dated: August 6, 1943.

MAURICE STECKLER,
Administrator c. t. a. of the Estate of
David Steckler, deceased,
Petitioner.

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court by Welsh, J., appears at pages 5 through 12 of the Record and is reported in 44 F. Supp. 800. The opinion of the United States Circuit Court of Appeals by Goodrich, C. J., appears at pages 65 through 76 of the Record and has not been reported.

Jurisdiction

The judgment sought to be reviewed was entered May 11, 1943 (R. 77).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition (pp. 1-2).

Specification of Errors

The assigned errors to be urged are identical with the "Reasons for Granting the Writ" set forth in the accompanying petition.

ARGUMENT

I. The purchase and holding by Pennroad of more than 10% of the voting capital stock of Boston and Maine were in violation of Section 54(2) of the New York Public Service Law.

Section 54(2) of the Public Service Law is an absolute bar to the acquisition or retention of more than 10% of the voting capital stock of a railroad corporation "organized or existing under or by virtue of the laws" of New York. The courts below have held that said section has no application to the acquisition or retention of stock of a consolidated corporation organized under the laws of New York and other states.

A corporation resulting from the consolidation of several corporations organized under the laws of New York and other states is a domestic corporation in New York and in each of the other states. Such consolidated corporation is incorporated in duplicate or triplicate, as the case may be, in each of the charter states (*Matter of Cooley*, 186 N. Y. 220, 223, 224, 78 N. E. 939, 940 [1906]; *Attorney-General* v. *New York, New Haven and Hartford R. R. Co.*, 198 Mass. 413, 84 N. E. 737 [1908]).

A consolidated corporation is subject to regulation as a domestic corporation by each and every one of its charter states. Although a consolidated corporation may be bound only by the law of the charter state in which a purely local act is done, without reference to the laws of the other charter states, it is required to comply with the laws of each of the charter states with respect to an act affecting the corporation in its entirety.

As a consolidated corporation has but a single issue of capital stock representing all of its property everywhere, matters affecting its capital stock necessarily affect the corporation in its entirety. Thus it is that a consolidated corporation may not issue stock in violation of the laws of one of the charter states, although such issuance is otherwise proper under the laws of the other charter states (*Pollitz* v. *Wabash Railroad Co.*, 150 App. Div. 709, 135 N. Y. S. 785 [1912]; *Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 152 N. Y. S. 803 [1915]; *Fisk* v. *Chicago, Rock Island and Pacific Railroad Co.*, 53 Barb. 513 [N. Y., 1868], unanimously affirmed by the General Term, see *O'Brien* v. *Chicago, Rock Island and Pacific Railroad Co.*, 36 How. Pr. 24 [N. Y., 1868]; *Attorney-General* v. *Boston and Maine Railroad*, 109 Mass. 99 [1871]). Likewise, the stock of a consolidated corporation may not be purchased in violation of the laws of one of the charter states (*Codman* v. *New York, New Haven & Hartford R. Co.*, 253 Mass. 144, 146, 150, 148 N. E. 467, 468 [1925]).

Similarly, a consolidated corporation is subject to restrictions imposed upon domestic corporations by one of its charter states (a) with respect to the issuance of bonds (*Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 152 N. Y. S. 803 [1915]; *Brown* v. *Boston & Maine Railroad*, 233 Mass. 502, 124 N. E. 322 [1919]; *Pittsburgh & State Line R. R. Co.* v. *Rothschild*, 4 Central Reporter 107, 109, 8 Sadler 83, 88-90, Pa. Supreme Ct. [1886], aff'g *Rothschild* v. *Rochester & Pittsburgh R. R. Co.*, 1 Pa. County Rep. 620, 625-627); and (b) with respect to the

guarantee of bonds of another railroad (*Pollitz* v. *Utilities Commission of Ohio*, 96 Ohio St. 49, 117 N. E. 149 [1917]).

A consolidated railroad is possessed of the same privileges and is subject to the same duties as those conferred and imposed upon exclusively domestic corporations in respect to other types of statutes (*State ex rel. Leese* v. *Chicago, Burlington & Quincy Railroad Co.*, 25 Neb. 156, 41 N. W. 125 [1888]; *Patch* v. *Wabash Railroad Co.*, 207 U. S. 277, 284 [107]; *Boardman* v. *Lake Shore & Michigan Southern Ry. Co.*, 84 N. Y. 157, 185 [1881]; *Sprague* v. *Hartford, Providence & Fishkill R. R. Co.*, 5 R. I. 233, 234, 235 [1858]; *In re St. Paul & Northern Pacific Ry. Co.*, 36 Minn. 85, 86, 30 N. W. 432 [1886]).

The courts of New York, Massachusetts and other states have held that a corporation organized under the laws of several states is "organized or existing under or by virtue of the laws" of one of said states within the purview of a statute containing language similar to that of Section 54(2) of the Public Service Law (*Sage* v. *Lake Shore & Michigan Southern Ry. Co.*, 70 N. Y. 220, 222 [1877] ["any incorporated company in this state"]; *New York Central Railroad Co.* v. *Flynn*, 233 App. Div. 123, 126, 251 N. Y. S. 343, 346-347 [1931] ["a domestic railroad corporation"]; *Patch* v. *Wabash Railroad Co.*, 207 U. S. 277, 284 [1907] ["any railroad corporation now incorporated or hereafter to be incorporated by the laws of this state"]; *Peters* v. *Boston and Maine Railroad*, 114 Mass. 127, 131, 132 [1873] ["any railroad corporation created by this state"]; *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad Co.*, 85 U. S. [18 Wall.] 206, 208 [1873] ["all railroad * * * companies incorporated under the laws of this state"]; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 96, 136 Atl. 66, 67 [1927] ["any domestic * * * corporation"]).

In *Codman* v. *New York, New Haven & Hartford Railroad Co.*, 253 Mass. 144, 149, 148 N. E. 467, 469 (1925), the court stated that Chapter 585 of the Massachusetts Acts of 1907 (now Sec. 71 of Chap. 160 of the General

Laws of Massachusetts, Tercentenary Ed., 1932, Vol. II, p. 2044) prohibiting the acquisition of any shares of the stock of "any domestic railroad company" applied to the acquisition of the stock of the Boston and Maine Railroad, which at that time had been organized under the laws of Massachusetts, Maine and New Hampshire.

The New York Public Service Commission has consistently applied Section 54(2) to the purchase of stocks of consolidated corporations organized under the laws of New York and other states (*In the Matter of the Application of the New York Central & Hudson River Ry. Co.*, Case No. 4645 [1914], 4 Dec. Pub. Serv. Com., 2nd Dist., N. Y. 258; *Petition of Philadelphia & Reading Railway Co.*, N. Y. Pub. Serv. Com., Case No. 359 [1922], unreported). The Commission has similarly treated consolidated corporations as subject to the provisions of Section 55 of the same law regulating the issuance of stock by "a railroad corporation * * * organized or existing" under New York laws. (See *Annual Report of Public Service Commission of the State of New York, 1921*, pp. 30-31; *Annual Report of the Public Service Commission of the State of New York, 1922*, pp. 50-51; *Annual Report of the Public Service Commission of the State of New York, 1923*, p. 43.) The consistent practice of the Public Service Commission in treating consolidated corporations as "organized or existing" under New York laws within the scope of Section 54(2) is entitled to great weight (*New York, Chicago & St. Louis Railroad Co.* v. *Frank*, 314 U. S. 360 [1941]).

Furthermore, the court below erred in failing to find that Boston and Maine, by consolidating under Article 4, Sections 140-143, of the New York Railroad Law (Chap. 49 of the Consolidated Laws of 1910, c. 481), expressly subjected itself to the provisions of Section 54(2) of the Public Service Law.

Section 141 of the said Railroad Law provides in part that:

> "* * * such act of consolidation shall not release such new corporation from any of the restrictions,

liabilities or duties of the several corporations so consolidated."

The courts have enforced the obligation of consolidated corporations to conform to the laws of parent states where the consolidation was consummated pursuant to a statute similar to Section 141 of the New York Railroad Law (*People* v. *International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351 [1918], aff'd in *International Bridge Co.* v. *New York*, 254 U. S. 126, 130 [1920]; *Ashley* v. *Ryan*, 153 U. S. 436 [1894]; *New York, Chicago & St. Louis R. Co.* v. *Frank*, 314 U. S. 360 [1941]; *People* v. *New York, Chicago & St. Louis R. Co.*, 129 N. Y. 474, 480 [1892]).

The Fitchburg Railroad Co., which was one of the constituent railroads which entered into the consolidation forming the present Boston and Maine was organized pursuant to New York Laws, 1869, c. 917, as the result of the consolidation in 1887 of the Troy and Boston Railroad Co., a strictly New York corporation, and the Fitchburg Railroad Co., a Massachusetts corporation. (See *Commercial and Financial Chronicle*, Vol. 44, p. 544; *Poor's Manual of Railroads*, 1888, pp. 32-33; *People* v. *Fitchburg Railroad Co.*, 61 Hun 619, 15 N. Y. S. 644 [1891].) By virtue of the provisions of the New York Railroad Law, quoted above, and its antecedent statutes containing identical provisions, the Fitchburg Railroad Co. and the present Boston and Maine both subjected themselves to the laws of the state of New York, including, of course, the restrictions of Section 54(2) of the New York Public Service Law.

The District Court predicated its opinion that Boston and Maine was not "organized or existing under or by virtue of the laws of" New York, within the purview of Section 54(2), upon certain New York tax cases (*People* v. *New York, Chicago & St. Louis Railroad Co.*, 129 N. Y. 474 [1892]; *New York Central Railroad Co.* v. *Flynn*, 233 App. Div. 123, 251 N. Y. S. 343, aff'd without opinion

257 N. Y. 553, 178 N. E. 791 [1931]). These cases have been held by the New York courts to be *sui generis* and an exception to the general rule applied by the same courts (*New York Central Railroad Co.* v. *Flynn, supra,* 233 App. Div. at p. 126, 251 N. Y. S. at p. 346; see also 15 *Fletcher, Cycl. of Private Corporations,* Sec. 7189, p. 291; *Cooley on Taxation,* 4th Ed., Vol. II, Sec. 797).

The Circuit Court of Appeals recognized this and stated (R. 70):

> "We do not think the tax cases are conclusive upon the point. They do show that for the purpose of taxation by New York, the New York courts do not treat the multiple corporation solely as a New York corporation. They thereby make what has seemed to the courts an equitable application of New York tax laws in view of the multi-state character of the multiple corporation.
>
> Other New York decisions, on varying facts, emphasize the domestic nature of the multiple corporation * * *."

The conclusion of the Circuit Court of Appeals as to whether Section 54(2) was applicable to consolidated corporations was that "we are not clear that the one quoted above (the statute under consideration) is applicable; it may be" (R. 71).

The Circuit Court of Appeals also referred to two other problems presented by the instant case: (a) whether the purchase by Pennroad of more than 10% of the stock of Boston and Maine was a complete nullity under the New York law; and (b) whether the prohibition of the New York law is effective in Pennsylvania as against the absence of a similar prohibition under the laws of other states in which Boston and Maine was also chartered (R. 72). Neither of these important questions was finally determined by the Circuit Court of Appeals, which chose to rest its opinion on other grounds. (See Points 2 and 3, *infra.*)

By the express provisions of Section 54(2), any purchase or transfer of stock in violation of said statute "shall be void and of no effect" and shall not be "recognized as effective for any purpose." The intent of the legislature is so plainly expressed as to leave no room for doubt. Such purchase or transfer has been held absolutely void (*Matter of Gilchrist,* 130 Misc. 456, 488, 224 N. Y. S. 210, 246 [1927]; *In re New York State Railways* [Case No. 6066], 1932, N. Y. Pub. Serv. Com. Rep. 416, 427, 428; *In re Schenectady Railway Co.* [Case No. 6068], 1930, N. Y. Pub. Serv. Com. Rep. 175, 185-186; cf. *Berkey* v. *Third Avenue Ry. Co.,* 244 N. Y. 84, 90, 155 N. E. 58, 59; *id.,* 244 N. Y. 602, 155 N. E. 914 [1926], per Cardozo, J.; see also *United Cigarette Machine Co., Inc.* v. *Canadian Pac. Ry. Co.,* 12 Fed. [2d] 634, C. C. A. 2d [1926]; *Dunbar* v. *American Telephone & Telegraph Co.,* 238 Ill. 456, 87 N. E. 521 [1909]; *Hall* v. *Woods,* 325 Ill. 114, 156 N. E. 258 [1927]; *Buckeye Marble & Freestone Co.* v. *Harvey,* 92 Tenn. 115, 20 S. W. 427 [1892]).

States other than those imposing restrictions relating to the stock of, or other corporate matters affecting, a consolidated corporation will enforce said restrictions. In *Pollitz* v. *Wabash Railroad Co.,* 150 App. Div. 709, 135 N. Y. S. 785 (1912), the plaintiff stockholders sought an injunction against the Wabash Railroad Co. enjoining the issuance of preferred stock. The Wabash Railroad was a consolidated corporation formed under the laws of Ohio, Michigan, Indiana, Illinois and Missouri. New York was not a charter state. The constitution of the state of Missouri, one of the charter states, prohibited the issuance of preferred stock except upon consent of *all* the stockholders. The defendants contended that the New York court should not recognize the Missouri restriction since a majority of the stockholders consented to the issuance and such consent was proper under the laws of the remaining charter states, including Ohio where the stockholders' meeting for obtaining consents was held. The court af-

firmed the issuance of the injunction. It said (150 App. Div. at 712, 135 N. Y. S. at 787):

> "Undoubtedly, the meeting, called in conformity with the laws of Ohio, was regular; but *the corporate acts had to conform to all the laws under which the corporation was empowered to act at all.*" (Italics ours.)

After trial of the same case the court affirmed a judgment against the directors of the Wabash Railroad for damages sustained by the company as a result of the "illegal, void and *ultra vires*" issuance of bonds contrary to statutes of three of the five charter states prohibiting the issuance of bonds except for money paid, labor done or property actually received (*Pollitz* v. *Wabash Railroad Co.*, 167 App. Div. 669, 685-686, 152 N. Y. S. 803, 813, 814-815 [1915]. See also *Fish* v. *Chicago, Rock Island and Pacific R. R. Co.*, 53 Barb. 513 [N. Y., 1868]; *Attorney General* v. *Boston and Maine Railroad*, 109 Mass. 99 [1871]; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 [1927]; *People* v. *International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351 [1918], 254 U. S. 126 [1920]; *Vermont Valley Railroad Co.* v. *Connecticut River Power Co. of New Hampshire*, 99 Vt. 397, 133 Atl. [1926]).

It has been shown that a restriction upon the ownership of stock of a consolidated corporation by one of the parent states will be enforced, even though such ownership is not unlawful under the laws of other parent states (*Codman* v. *New York, New Haven & Hartford R. Co.*, 253 Mass. 144, 149, 148 N. E. 467, 469 [1925]). This necessarily follows since a consolidated corporation is defined as having "a capital stock which is a unit, and only one set of shareholders, who have an interest, by virtue of their ownership of shares of such stock, in all its property everywhere" (*Graham* v. *Boston, Hartford & Erie Railroad Co.*, 118 U. S. 161, 169 [1886]; *Matter of Cooley*, 186 N. Y. 220, 223-224 [1906]). Thus matters relating to the ownership and issuance of the stock of a consolidated corporation are matters affecting the corporation in its

entirety and of a nature requiring compliance with the laws of each of the charter states. Accordingly, if under the law of New York the ownership of stock of a consolidated corporation above a designated percentage is void and a nullity, such ownership must be void and a nullity everywhere.

II. A derivative action may be maintained against the directors of Pennroad to recover losses resulting from the violation of Section 54(2) of the Public Service Law of New York; the Public Service Commission is not the only one who may complain with respect to violations of said section.

The court below held that "the propriety of Pennroad's purchase of Boston and Maine stock is a matter to be raised by the Public Service Commission, if at all" (R. 74). This decision is predicated upon the erroneous assumption that the instant case is in the nature of a statutory action commenced under or pursuant to Section 54(2) of the Public Service Law of New York.

This action is not a statutory action or an action to enforce a penalty. It is a stockholder's suit in equity in the derivative right of Pennroad to enforce the latter's *common law right* to redress the wrongs done it by the individual defendants in breach of their fiduciary duties as directors. The wrongs complained of consist of the waste of corporate funds expended to purchase stock in violation of certain statutes and to which stock Pennroad, despite the expenditure of said funds, never acquired title.

The right of a stockholder to bring a suit, on behalf of the corporation, against directors to recover for losses sustained by the corporation as the result of an illegal or *ultra vires* act, where a demand upon the corporation to sue would be futile, requires no citation of authorities.

The unreported decision of *Gray* v. *Gill*, relied upon by the court below, is clearly distinguishable since the claim

asserted under the statute was not at common law for damages suffered by the plaintiff as the result of the violation of the statute. In so far as the statute was relied upon, the action was statutory. The case of *Kansas City, Southern Ry. Co.* v. *Chicago, Great Western R. Co.*, 58 F. (2d) 810 (N. D. Mo., 1932), is likewise distinguishable on similar grounds.

The contention that plaintiff may not bring this action because the statutes violated by Pennroad were not enacted for the benefit or protection of the class of which it is a member is without merit. A stockholder may unquestionably sue in the derivative right of a corporation to protect property of the corporation or to recover losses sustained by the corporation, even though the statute violated by the corporation was not enacted for the benefit or protection of the corporation (*Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646 [1896]; *DeKoven* v. *Lake Shore & M. S. Railway Co.*, 216 Fed. 955, 957-958 [D. C., S. D. N. Y., 1914]; *Venner* v. *New York Central & H. R. R. R. Co.*, 177 App. Div. 296, 343-344, 164 N. Y. S. 626, 657-658 [1917], affirmed in 226 N. Y. 583, 123 N. E. 893; *Di Tomasso* v. *Loverro*, 250 App. Div. 206, 293 N. Y. S. 912, affirmed in 276 N. Y. 551, 15 N. E. [2d] 570 [1937]; *Central Railroad Company* v. *Collins*, 40 Ga. 583, 628-629 [1869]). In such action he sues not upon the statute but in assertion of his common law right to protect or restore the property of the corporation of which he is a member.

III. Section 54(2) of the Public Service Law of New York is enforceable in a forum other than New York.

The court below concluded that claims arising under Section 54(2) of the Public Service Law of New York are not enforceable in a federal court in the Eastern District of Pennsylvania. The court held that said statute was concerned with "the governmental interests" (R. 75) of

the State of New York and its enforcement provisions "sound in terms of penal laws" (R. 76). This conclusion ignores the fact that this is a common law action against directors for losses suffered by the corporation, and that it is not a statutory action to enforce a penalty (see Point II, *supra*).

The courts of states other than those imposing statutory regulations relating to the stock of, or other corporate matters affecting, a consolidated corporation have enforced claims asserted by private individuals based upon violations of such statutes (*Pollitz* v. *Wabash R. Co.*, 167 App. Div. 669, 685-686, 152 N. Y. S. 803, 813, 814-815 [1915]; *Fisk* v. *Chicago, Rock Island and Pacific R. R. Co.*, 53 Barb. [N. Y., 1868] 513; *Northern Central Railway Co.* v. *Fidelity Trust Co.*, 152 Md. 94, 136 Atl. 66 [1927]; *Vermont Valley Railroad Co.* v. *Connecticut River Power Co. of N. H.*, 99 Vt. 397, 133 Atl. 367 [1926]). It matters not that the same statutes also impose penalties for the violation of their terms. The fact that the action of the directors in the instant case also constituted a crime does not preclude an action to make Pennroad whole for the losses suffered as a result of said illegal acts (*In re Debs*, 158 U. S. 564, 594 [1895]). An act is not less actionable as a tort because it may also be a misdemeanor (*Fidelity and Deposit Co.* v. *Grand National Bank*, 69 F. [2d] 177, 181 [C. C. A. 8, 1934]). Nor is an action based upon a loss, actually sustained by Pennroad, an action to enforce a penalty (*Brady* v. *Daly*, 175 U. S. 148, 154-155 [1899]; *Cockrill* v. *Cooper*, 86 Fed. 7, 12-13 C. C. A. 8, [1898]).

The court below further held that "even if the violation of the statute in question gave rise to private claims by individuals, in the manner discussed above, we do not think that they are the type of claims cognizable in another forum" (R. 76). The present action could be brought only where the individual defendants and the corporate defendant Pennroad could be served (cf. Section 51 of the Judicial Code, 28 U. S. C. A., par. 112). The individual defendants

in the instant case are residents of Pennsylvania and the defendant Pennroad can be sued in Pennsylvania by reason of the aforesaid statute. If the federal courts, despite the provisions of said statute, refuse to entertain litigation arising from the violation of statutes of other states than the forum in which the suit is brought, directors may violate the statutes of states other than those in which they reside with impunity, and the losses suffered by their corporation could not be recovered. We submit the present action was properly brought in the United States District Court for the Eastern District of Pennsylvania, and the losses suffered by Pennroad as a result of the illegal acts of the defendant directors are properly recoverable in this action. It was so held by the District Court on an earlier motion by the defendants to dismiss the complaint for lack of jurisdiction.

IV. The purchase and holding by Pennroad of more than 10% of the total capital stock of Boston and Maine were in violation of the laws of Massachusetts and ultra vires.

A

Unlike Section 54 of the Public Service Law of the state of New York, the prohibition contained in Section 5 of Chapter 156 of the General Laws of Massachusetts, quoted *supra,* Petition, page 3, is not made expressly applicable to foreign corporations.

Under well-settled rules of comity, however, and when said Massachusetts statute is read together with Section 2 of Chapter 181 of the Laws of Massachusetts, it becomes clear that the restrictions of said Section 5 of Chapter 156 are equally applicable to foreign corporations.

A foreign corporation may not do any act within a state repugnant to the laws or the declared public policy of said state (*American Law Institute: Restatement of the Law*

...ct of Laws, Sec. 165, comment b, c; *Commissioner ...ase Securities Corp.,* 298 Mass. 285, 10 N. E. [2d] 472, 491 [1937]; affirmed in 302 U. S. 660; *Pacific Wool Growers* v. *Commissioner of Corporations and Taxation,* 305 Mass. 197, 25 N. E. [2d] 208, 214 [1940]; *Claflin* v. *United States Credit System Company,* 165 Mass. 501, 43 N. E. 293 [1896]).

As a matter of conflict of laws, it is well settled that the holding of stock, as distinguished from the certificates of stock which are the evidence of ownership, constitutes an act done within the state of incorporation of the corporation whose stock is held, and is subject to the jurisdiction of that state (*American Law Institute: Restatement of the Law of Conflict of Laws,* Sec. 53, comment a). This is so because the situs of such shares is the state of incorporation of such corporation (*Morson* v. *Second National Bank of Boston,* 306 Mass. 588, 29 N. E. [2d] 19, 21 [1940]; 13 *American Jurisprudence,* Sec. 174, p. 300; *Beale, Conflict of Laws,* Vol. I, Sec. 104.1, pp. 446-448; *id.,* Vol. I, Sec. 118, c. 27, pp. 576-577). Boston and Maine was incorporated in Massachusetts (*Attorney-General* v. *New York, New Haven and Hartford Railroad Co.,* 198 Mass. 413, 84 N. E. 737 [1908]; *Peters* v. *Boston and Maine Railroad,* 114 Mass. 127 [1873]).

Not only under principles of comity, but also by the express provisions of Section 2 of Chapter 181 of the Massachusetts laws, quoted *supra,* Petition, page 3, is Pennroad, a foreign corporation, subject to the restrictions set forth in Section 5 of Chapter 156 of the said laws.

Statutes similar to Section 2 of Chapter 181 prohibiting foreign corporations from engaging in business prohibited to domestic corporations are not uncommon. Where, in addition to such statute, another statute prohibits domestic corporations from acquiring or holding stock in other domestic corporations, it is held that foreign corporations whose chief object is the acquisition and holding of stock are similarly prohibited from acquiring or holding stock in domestic corporations. In such case, the foreign hold-

ing corporation is said to be "doing business" within the state because the purchase and holding, far from being incidental activities, constitute the *principal business for which the corporation was organized,* since the profits derived therefrom are the profits for which the corporation was organized (20 *Corpus Juris Secundum, Corporations,* Sec. 1876, p. 97; *id.,* Sec. 1841, p. 61; 23 *American Jurisprudence, Sec.* 208, p. 187; *Coler* v. *Tacoma Ry. & Power Co.,* 65 N. J. Eq. 347, 351, 352, 54 Atl. 413, 414 [1903]; *Bankers Holding Corp.* v. *Maybury,* 161 Wash. 681, 297 Pac. 740 [1931]; *Central Life Securities Co.* v. *Smith,* 236 F. 170, 176 [C. C. A. 7, 1916]; *Southern Electric Securities Co.* v. *State,* 91 Miss. 195, 44 So. 785 [1907]; *Hall* v. *Woods,* 325 Ill. 114, 132-134, 142-144, 156 N. E. 258, 265-266, 269 [1927]).

The court below held that Section 5 of Chapter 156 was inapplicable to purchases by foreign corporations. It relied solely upon the authority of *Flynn* v. *Department of Public Utilities,* 302 Mass. 131, 18 N. E. (2d) 538 (1939). The *Flynn* case does not hold that a foreign corporation is not within the prohibition of Section 5 of Chapter 156. The only issue before the court was whether the Department of Public Utilities properly declined to exercise jurisdiction to investigate the sale and exchange of securities as between *two Massachusetts trusts.* The court sustained the Department's action.

No foreign corporation acquired or was intended to acquire any stock of a domestic public utility in the *Flynn* case, and, therefore, no question relating to a foreign corporation was before the court. This is clear from the decisions of the Department of Public Utilities (Complaint of H. Francis Flynn, Mass. Department of Public Utilities, Case No. 5331) and of the Supreme Judicial Court. The petitioner in the hearing before the Department charged, among other things, that a Delaware subsidiary corporation was a party to a contract whereby one Massachusetts trust was transferring to another Massachusetts trust, the Delaware corporation's parent, approximately 10½% of

the stock of a Massachusetts utility corporation. The Department expressly found, however, that the Delaware subsidiary was employed merely as an "instrumentality" or "conduit" in the transaction and not as the purchaser of the shares of the Massachusetts utility. It added that "the matter will be reported for judicial action if it is found to be otherwise upon further inquiry of the Department". Prior to the proceeding in the Supreme Court the transaction had been fully consummated and the stock had been acquired, not by the Delaware holding company, but by the Massachusetts voluntary trust association.

The court's statement that "only domestic corporations are forbidden to hold more than ten per cent of the stock of such a company" relates to the powers of a *Massachusetts voluntary trust* as contrasted with those of a *Massachusetts corporation* within the purview of Section 5 of Chapter 156. The court is very careful to define at length the full powers of supervision and investigation granted by the statutes to the Department with respect to the control by such domestic trusts of domestic public service companies (302 Mass. at pp. 133-135, 18 N. E. [2d] at pp. 540-541). No such powers of supervision and investigation exist with respect to foreign holding companies. They cannot conceivably have greater rights than domestic corporations or trusts. The very purpose of Section 2 of Chapter 181 and the long established public policy restricting stock ownership in, and unsupervised control of, Massachusetts public service companies permit no other conclusion.

B

The certificate of incorporation of Pennroad (Exhibit "A" annexed to the amended complaint), after setting forth the powers of the corporation, expressly provides that the exercise of such powers be subject to the following limitation:

> "* * * provided, however, that the Corporation shall not in any state, territory or country, carry on any business or exercise any powers, which a corporation organized under the laws of said state, territory or country could not carry on or exercise except to the extent permitted or authorized by the laws of such state, territory or country."

The language is clear and definite. This limitation upon the powers of Pennroad effectively places Pennroad under the same restrictions as a domestic corporation in any state where Pennroad carries on business or exercises such powers.

V. The New York and Massachusetts statutes under consideration are not superseded by the Transportation Act of 1920, as amended by the Act of June 16, 1933.

The defendants have argued that Section 5(4) of the Transportation Act of 1920, 49 U. S. C. A., Section 5, as amended by Act of June 16, 1933, c. 91, Section 202, Title II, 48 Stat. 217, 219, as amended, has superseded the New York and Massachusetts statutes under consideration. This contention was presumably adopted by the District Court below (R. 12).

The question raised is of first impression. Paragraph 15 of the same Section 5 of the said Act provides:

> "(15) The carriers and any corporation *affected by any order* made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, *insofar as may be necessary to enable them to do anything authorized or required by such order.*" (Italics ours.)

Congress by this provision carefully expressed its intention not to supersede all state laws regulating railroad and

holding company control of railroads. Until an order is entered by the Interstate Commerce Commission state laws control. Otherwise holding companies, like Pennroad, could continue their activities safely beyond the reach of both state and federal regulation.

Since there has been no order of the Interstate Commerce Commission entered under Section 5 authorizing Pennroad to acquire control of Boston and Maine, Pennroad remains subject to the prohibitions of Section 54(2) of the Public Service Law of the State of New York, and Section 5 of Chapter 156 of the Laws of Massachusetts.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

EMIL WEITZNER,
JAMES HOWARD MOLLOY,
Counsel for Petitioner.

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 245.

MAURICE STECKLER, Administrator C. T. A. of the Estate of David Steckler, Deceased,

Petitioner,

v.

THE PENNROAD CORPORATION; FIDELITY-PHILADELPHIA TRUST COMPANY, sole and substituted Executor of the Estate of William Wallace Atterbury, Deceased; JAY COOKE, sole surviving Executor of the Estate of Jay Cooke, Deceased; ALBERT J. COUNTY; WILLIAM M. ELKINS; HERBERT W. GOODALL; RODMAN E. GRISCOM; JOHN H. W. INGERSOLL, C. JARED INGERSOLL, R. STURGIS INGERSOLL and HENRIETTA A. S. INGERSOLL, Executors of the Estate of Charles Edward Ingersoll, Deceased; ALEXANDER D. IRWIN; EDITH CARPENTER LEE and THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Executors of the Estate of Henry H. Lee, Deceased; JOHN H. MASON; HERBERT A. MAY; RICHARD KING MELLON, SARAH MELLON SCAIFE and THE UNION TRUST COMPANY, Executors of the Estate of Richard B. Mellon, Deceased; EFFINGHAM B. MORRIS, JR., and GIRARD TRUST COMPANY, Executors of the Estate of Effingham B. Morris, Deceased; FRANCIS J. RUE and FIDELITY-PHILADELPHIA TRUST COMPANY, Executors of the Estate of Levi L. Rue, Deceased; P. BLAIR LEE and G. WILLING PEPPER, Executors of Estate of Joseph Wayne, Jr., Deceased; and MARK WILLCOX,

Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943. No. 245.

Maurice Steckler, Administrator c. t. a. *of the Estate of David Steckler, Deceased,*

Petitioner,

v.

The Pennroad Corporation, et al.,

Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI IN AMPLIFICATION OF PETITIONER'S STATEMENT OF MATTERS INVOLVED, PLEADINGS, AND STATUTES INVOLVED.

Petitioner has neglected to include in the statement of his petition the following pertinent factors:

(1) The penal provision of the New York Statute applicable to the alleged violation, being Sec. 58 of the Public

Service Law of the State of New York (Chapter 48 of the Consolidated Laws, L. 1910 c. 480 as amended, McKinney's, Book 47), is as follows:

> "1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the State of New York a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in action as provided in section twenty-four of this chapter.
>
> "2. Every person, who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter, or in its failure to obey, observe or comply with any such order, shall be guilty of misdemeanor.
>
> "3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to

be the act of such common carrier, railroad corporation, street railroad corporation or corporation."

(2) By the express terms of Sec. 54 of the Public Service Law of the State of New York, all purchases with respect to which Sec. 58 pertains may be made with the consent of the Commission, which if not obtained subjects, under Sec. 24, the offender to penalties in a suit instituted in the State of New York, and nowhere else by counsel of the Commission.

(3) The Amended Bill of Complaint contains no allegation that the Public Service Commission of New York or any other New York authority has ever complained of or moved with respect to the alleged violation of the statute.

(4) Section 5, Chapter 156 of the general laws of Massachusetts (Tercentenary Ed. 1932, Vol. II, p. 1955, Mass. Acts, 1913, c. 597), applies only to the acquisition of stock by a Massachusetts corporation, the Chapter 156 of which the Section 5 relied upon by the petitioner is a part, being the general law of Massachusetts business corporations as revealed by the following sections of that law:

"Section 1. In this chapter, unless a contrary intention appears, 'corporation' shall mean a corporation to which, under section two, this chapter applies,"——

"Section 2. Except as expressly made applicable by reference in subsequent chapters, this chapter shall not apply to corporations organized for the purpose of carrying on the business of a bank. * * * *It shall apply to all other domestic corporations* having a capital stock and heretofore or hereafter established."

ARGUMENT.

A. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF THE WRIT.

In review of the reasons which will be considered as outlined in Rule 38 (5) of the Supreme Court of the United States, we respectfully submit:

(*a*) This case is in a Federal Court solely on the ground of diversity of citizenship, the complainant being a resident of New York, the corporate defendant a resident of Delaware, and the individual defendants residents of Pennsylvania.

(*b*) A decision of a State Court is not involved.

(*c*) The petition for the writ does not and could not properly suggest that the decision is in conflict with the decision of any other Circuit Court of Appeals on the same or even a similar matter.

(*d*) The decision is with respect to local statutes, one of New York, one of Massachusetts, but there is no important question of local law involved. The Circuit Court in its decision by footnote refers to a writer in the Yale Law Journal reporting that "A survey of Moody's manuals has revealed no multiple corporations among the Industrial and Public Utility Corporations, and only 68 among the railroads. See Note (1937) 46 Yale L. J. 1370, 1382 F. N. 88" (transcript of record, p. 69). The only bearing of the decision would be its possible influence upon the courts of New York and Massachusetts in deciding the applicability of their own statutes on the minute number of cases that might come before those courts with multiple corporations as parties. The decision would not even be binding upon those courts. The legal significance of the decision, aside from the determination of this particular case, is therefore practically *nil.*

(*e*) The decision is not in conflict with applicable local decisions.

The decision notes that the Supreme Judicial Court of Massachusetts in *Flynn* v. *Commissioners of Department of Public Utilities,* 302 Mass. 131, 18 N. E. (2d) 538 (1939) in a "forthright statement," meaning "precisely what it said," decided that the Massachusetts statute does not prohibit a foreign corporation from the acts of the corporate defendant complained of by the plaintiff (transcript of record, pp. 66, 67).

The Circuit Court then considered whether the New York statute applied to the purchase of stock of a multiple corporation. In support of a negative answer to that question the Circuit Court mentioned: *People* v. *New York C. & St. L. Co.,* 129 N. Y. 474, 654, 29 N. E. 959 (1892); *In Re Matter of Cooley,* 186 N. Y. 220, 78 N. E. 939 (1906); *New York Central Railroad Co.* v. *Flynn,* 233 App. Div. 123, 251 N. Y. Supp. 343 (3rd Dept. 1931), affirmed 57 N. Y. 553, 178 N. E. 791 (1931) (transcript of record, pp. 69 and 70).

Those cases are upon New York tax statutes, and as pointed out by the Circuit Court, they definitely determine that the phrase in the statutes, "organized or existing under or by virtue of the laws of this State," does not include multiple corporations organized or existing under the laws of several states, of which New York is one. Though the Circuit Court says that it does "not think the tax cases are conclusive upon the point," the Circuit Court is manifestly impressed by their weight and we find in the opinion:

> "The tax cases show that all the statutes applicable to domestic corporations do not necessarily become applicable to a multiple corporation. We are not clear that the one quoted above (the statute relied upon by the plaintiff) is applicable; it may be." (Transcript of record, p. 71.)

The Circuit Court finds no New York decision *contra* to the view that the statute does not apply to a multiple corporation, and therefore it can properly be said, and we aver, that if the Circuit Court had decided the New York question on the sole ground that the New York statute did not apply to a multiple corporation, such a decision would not in any way be in conflict with any applicable New York decision.

The Circuit Court decided the New York aspect of the case on two other counts. The count involving a local decision being that the Public Service Commissioner of New York was the only party entitled to raise the issue. It analyzed and quoted in support of this view the New York case of *Gray* v. *Gill,* App. Div. 233 App. 809, 227 N. Y. Supp. 816 (4th Dept. 1928), in the Court of Appeals 250 N. Y. 519, 166 N. E. 308 (1928) (transcript of record, p. 73). There is no suggestion in the petition that there has been any case decided by any New York court in conflict with Gray *v.* Gill, *supra.*

(*f*) The decision decides no question of Federal law.

(*g*) The decision decides no Federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States. If the finding that "such an action (the proceedings initiated by the plaintiff's bill) would not be entertained in the state courts of Pennsylvania nor can it be maintained by a Federal court in the district of Pennsylvania having jurisdiction because of diversity of citizenship" (transcript of record, p. 76), be considered a Federal question, it was certainly decided correctly and in no sense in conflict with the applicable decisions of the United States Supreme Court. *Klaxon Co.* v. *Stentor Elec. Manufacturing, Inc.,* 313 U. S. 495 (1941); *Griffin* v. *McCoach,* 313 U. S. 498; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

B. THE DECISION OF THE CIRCUIT COURT IS NOT IN ERROR.

The respondents to the petition for the writ pressed upon the Circuit Court the following views, and in listing them we will mention the disposition made of the point by the Circuit Court.

(*a*) *The Massachusetts statute contains no prohibition against the defendant Pennroad purchasing more than ten percent of the capital stock of the Boston & Maine Railroad.* In support thereof respondents cited *Flynn* v. *Commissioners of Department of Public Utilities,* 302 *Mass.* 131, 18 N. E. (2d) 538 (1939). The Circuit Court fully adopted this view, stating that the Supreme Court of Massachusetts "meant precisely what it said" in concluding that only domestic corporations were forbidden to hold more than ten percent of the stock of utility corporations and that "this forthright statement as to the applicability of paragraph 5 is conclusive upon us as to the Massachusetts law." (Transcript of record, p. 67.)

(*b*) *The New York statute pertaining to the purchase of capital stock of a railroad corporation "organized or existing under or by virtue of the laws of this state," by its very terms did not refer to the purchase of stock of a corporation such as is the Boston & Maine, organized and existing under the statutes of the state of New York and other states.* In support of that point the respondents, before the Circuit Court, cited *People* v. *New York C. & St. L. R. Co.,* 129 N. Y. 474, 654, 29 N. E. 959 (1892); *Venner* v. *New York Central & H. R. R. Co., et al.,* 164 N. Y. S. 626, 226 N. Y. 583, 123 N. E. 870; *Ohio & M. R. Co.* v. *People,* 123 Ill. 467, 14 N. E. 874; *New York Central R. R. Co.* v. *Flynn,* 233 App. Div. 123, 251 N. Y. S. 343; affirmed by the Court of Appeals, 57 N. Y. 553, 178 N. E. 791; and *Matter of Cooley,* 186 N. Y. 220, 223, 78 N. E. 939 (1906); *State Treasurer* v. *Auditor General,* 46 Mich. 224, 9 N. W. 258; and the very pertinent fact that

Section 140 *et seq* of Article 4, Chapter 49 of Consolidated Laws of New York, known as the Railroad Law, Book 48 McKinney's, p. 152 *et seq.* with respect to consolidation, lease, sale and reorganization; with respect to local taxation; and with respect to the lessee of a railroad acquiring stock in the landlord company draws with respect to each category the distinction between a railroad organized under the statutes of the state of New York alone and a multiple corporation, by the use in the statute of the phrase: "Organized under the laws of this state *or of this state and any other state.*"

As heretofore pointed out, the Circuit Court clearly indicated that the above mentioned New York cases were probably controlling of the point and in full relief of these respondents, but for the sake of final certainty decided the question on other points.

(*c*) *If the New York or the Massachusetts statute applied to the transaction under consideration, those statutes might only be applied within the territorial limits of the respective statute-making states.* The respondents argued that the Boston & Maine originally had certain charter rights and obligations, among them being the right and the obligation to transfer its stocks to its stockholders as they might from time to time be constituted. This right and obligation stemmed from the legislation of four states, Maine, New Hampshire, Massachusetts and New York. Respondents pointed out that if the plaintiff in this suit were correct, a New York statute abrogating the Boston & Maine Railroad's right to operate and in relief of its obligation to operate a railroad, would deprive the Boston & Maine of the right and relieve it of the obligation to operate a railroad in the states other than the statute-making state. An absurd result, but no more absurd than the claim of the plaintiff.

Respondents argued, using the words of Justice Andrews in *People* v. *New York, Chicago & St. Louis*

R. R. Co., 129 N. Y. 474, 29 N. E. 959, that the Legislature of a single state is "impotent alone to accomplish" the result desired by the plaintiff. The respondents further referred to *Attorney General* v. *New York, New Haven & Hartford R. R. Company*, 198 Mass. 413, 84 N. E. 737; *Mackay* v. *New York, N. H. & H. R. R. Co.*, 82 Conn. 73, 72 Atl. 583, as authority for the proposition that if a limitation on a corporate right enacted by one of the states creating a multiple corporation will not be recognized in sister states creating that corporation, it positively may not be recognized in Pennsylvania, a state in which the corporation is in no sense domiciled or to which it is in no sense related.

The Circuit Court reached the respondents' conclusion, quoting as the reason for the rule that no action can be maintained on a right created by the law of a foreign state as a method of furthering that foreign state's governmental interests Judge Learned Hand's statement in *Moore* v. *Mitchell*, 30 F. 2d, 600, 604 (C. C. A. 2, 1929), affirmed 281 U. S. 18 (1930)—"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between states themselves with which others are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor."

(*d*) *The statute referred to in the complaint gives no right of action to the plaintiff against the defendants.* The respondents pressed the case of *Gray*, v. *Gill, supra.* The Circuit Court agreed.

(*e*) The respondents before the Circuit Court also pointed out that the plaintiff in the court below did not and could not aver that the alleged violation of the statutes is or will be in any manner the legal cause of any loss

the Pennroad Corporation might suffer by reason of its investment in Boston & Maine stock; and further, that the application of the statutes of the State of New York, as demanded in the complaint, would be an unlawful delegation of legislative authority and in violation of the Constitution of the State of New York; and further, the application, as demanded in the complaint, of the statutes would be in violation of the Commerce Clause, Article 1, Sec. 8 of the Constitution of the United States, and the Act of Congress of date June 16, 1933, delegating to the I. C. C. jurisdiction with respect to companies other than railroad companies in regard to the acquisition of securities of railroad companies by non-railroad companies—U. S. C. A. Title 49, Sec. 54 as amended.

The Circuit Court, having eliminated the Massachusetts question on the basis of the specific decision of the Supreme Judicial Court of Massachusetts, and having been tempted to but having refrained from fully eliminating the New York question by a determination that the New York statute was in no sense applicable to a multiple corporation, decided the New York question upon the points mentioned in paragraphs (*c*) and (*d*) *supra*, and therefore made no reference whatsoever to the points presented by these respondents and mentioned in the immediately preceding paragraph.

CONCLUSION.

We submit that there is nothing in this case that calls for a review by the Supreme Court of the United States on a writ of certiorari, and moreover, we submit that the decision of the Circuit Court of Appeals of the Third Circuit was a correct disposition of all matters at issue.

The respondents therefore respectfully pray that the petition for a writ of certiorari be dismissed.

Respectfully submitted,

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